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Controlled Growth Zoning: Confronting the Inevitable

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NOTE

CONTROLLED GROWTH ZONING: CONFRONTING THE INEVITABLE

INTRODUCTION

It is evident to the residents of urban areas that the unbridled and unplanned growth of the last two decades has had numerous ramifications for all aspects of life. The rapid residential growth experienced by outlying communities in metropolitan areas has sparked concern over the inadequacy of existing services and facilities and the future quality of life as a burgeoning population places ever greater demands upon those facilities.[1] In response to the growing awareness of the problems of urban expansion and sprawl, communities have increasingly focused their attention on land use regulations.[2] The effects of various land use policies on suburban and urban residents are undergoing close examination, while experimentation with land use management itself has come into vogue.[3] The past decade has witnessed the emergence of a relatively novel form of regulation which falls within the general rubric of controlled

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[1] *See generally* TASK FORCE ON LAND UTILIZATION AND URBAN GROWTH, THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH (1973) [hereinafter cited as TASK FORCE REPORT]; Fagin, *Regulating the Timing of Urban Development,* 20 LAW & CONTEMP. PROB. 298 (1955); Freilich, *Development Timing, Moratoria, and Controlling Growth,* in II MANAGEMENT & CONTROL OF GROWTH 361 (R. Scott ed. 1975); Morrison, *Population Movements and the Shape of Urban Growth: Implications for Public Policy* (Commission on Population Growth and the American Future, Research Reports, Vol. V, 1972).

[2] One commentator has aptly described the state of land use controls in most communities:

> The theory behind the current system is that the members of a community can sit down one fine day and determine not only the general nature of its future development but also every detail . . . . [T]his rests on the assumption that it has a clear vision of an end state for itself . . . .

Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregulation v. Administrative Discretion,* in THE NEW ZONING: LEGAL, ADMINISTRATIVE AND ECONOMIC CONCEPTS AND TECHNIQUES 3, 4 (N. Marcus & M. Groves eds. 1970).

It is of interest to note that Lexington, Kentucky, is currently seeking advice from the author of the Ramapo plan, Robert Freilich. Lexington Herald-Leader, May 22, 1977, § D, at 1, col. 2.

[3] *See generally* E. FINKLER & D. PETERSON, NONGROWTH PLANNING STRATEGIES (1974) [hereinafter cited as FINKLER & PETERSON].

growth zoning.[4] Although zoning ordinances have been recognized as a legitimate exercise of a state's police powers since 1926,[5] and despite the fact that all zoning serves to regulate or control competing uses of land in some fashion or another, it has been only in the recent past that comprehensive strategies were devised to allow local determination of the rate and quality of future expansion.[6]

The conflicts which are inherent in the urbanized environment affect nearly two-thirds of the U.S. population.[7] Suburban development has been fostered not only by low land prices on the urban fringes, but also by federal monies expended to aid residential construction and to provide school, sewer and highway facilities. In many metropolitan areas we are left with what has been termed "urban sprawl."[8] In large part the expansion of the suburban residential areas has been characterized by flight from the city[9] and commercial relocation, leaving many city centers burdened with high tax rates. These in turn must be borne by the economically disadvantaged, those aged, poor, ethnic and minority group members who lack, or, less often, choose not to exercise, the mobility to escape.[10]

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[4] Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 422 U.S. 934 (1976); Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

[5] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[6] FINKLER & PETERSON, *supra* note 3, at 7.

[7] Between 1960 and 1970 the population included within the Census Bureau's Standard Metropolitan Statistical Areas (SMSAs) increased from 63% to 68.6%. Land area incorporated within the SMSAs during the same decade grew from 8.7% to 11.0% of the total land surface. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1976, 16 (97th ed. 1976) [hereinafter cited as STATISTICAL ABSTRACT].

[8] Urban sprawl "refers to an unfettered form of urban expansion which is characterized by the initial nonuniform improvement of isolated and scattered parcels of land located on the fringes of suburbia . . . ." Note, *A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development*, 47 N.Y.U.L. REV. 723 (1972) (footnotes omitted).

[9] During the 1960s the racial composition of central cities changed from 30% to 27.9% for whites and from 50.5% to 56.5% for blacks and other minorities. While the white population in the urban fringe increased from 22.8% to 28.9% between 1960 and 1970, the minority population grew from 8.4% to 12.3%. STATISTICAL ABSTRACT, *supra* note 7, at 18.

[10] In 1974, 9.8% of the white residents of central cities and 29.6% of the black residents fell below federal poverty levels. Of the residents outside the central cities but still within the metropolitan areas, 6.2% of the white and 21.9% of the black were below poverty levels. In contrast, of those who lived outside metropolitan areas, 11.7%

Two themes which go hand-in-hand with these occurrences are pervasive today. The first is the right of private exploitation of land. That this is a deeply held value is manifested by individual frustration over programs sponsored by any authority, be it municipal or state, or worse, federal, to specify preferred land use patterns. The second theme, clearly related to the first, is the propriety of local autonomy in land use regulation. These two traditions often conflict not only with one another, but also with attempts at state, regional and national planning.[11] The fundamental rights in question involve the relationship between individuals and their communities, for the specification of property rights has characterized society throughout recorded history.[12]

The report of the Task Force on Land Use and Urban Growth stated: "[T]he new attitude toward growth is not exclusively motivated by economics. It appears to be part of a rising emphasis on humanism, on the preservation of natural and cultural characteristics that make for a humanly satisfying living environment."[13] Whatever the motivation, it is clear that suburban towns are faced with pressures which confuse them and spur them to consult with an expanding cadre of urban planners.[14] It is significant to all parties involved that these future plans eventually find their way into the judicial system. It is especially significant to the judiciary itself, which often mediates competing interests in areas over which it has little expertise.[15]

The controlled growth schemes are based on the premise

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and 42.0% of the white and black populations respectively qualified for low-income status. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1974, 23 (Advance Report 1975).

[11] *See generally* H. CHUDACOFF, THE EVOLUTION OF AMERICAN URBAN SOCIETY (1975); R. MOHL & J.F. RICHARDSON, THE URBAN EXPERIENCE: THEMES IN AMERICAN HISTORY (1973); S. TOLL, ZONED AMERICAN (1969).

[12] Hecht, *From Seisin to Sit-in: Evolving Property Concepts*, 44 B.U.L. REV. 435 (1964).

[13] TASK FORCE REPORT, *supra* note 1, at 34.

[14] *See* cases cited note 4 *supra* for explanation of the motivations behind consulting urban planners; Franklin, *Land Use and Litigation*, 32 URB. LAND 3 (May 1973).

[15] "Implicit in such a philosophy of judicial self-restraint is the growing awareness that matters of land use and development are peculiarly within the expertise of students of city and suburban planning . . . ." Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291, 301, 334 N.Y.S.2d 138, 151 (1972).

that local zoning is the foundation of land use regulation. The controls currently employed include moratoria on residential construction and development; sewer, water or school facility expansion; population "caps"; planned unit developments; and timed development programs.[16] Although advocates and opponents alike are drawn from disparate camps,[17] fundamental issues are recognized by both sides, namely the legitimacy of programs likely to result in exclusionary zoning and the constitutional issues of equal protection, due process, and the freedom to travel, migrate and settle.[18] On the one hand, plans which endorse deliberate, reasoned assessment of future growth policies, in recognition of land as a limited resource rather than a commodity, are a welcome perspective on a troubled vista. On the other hand, and here the balance must be carefully struck, locally-originated programs may promote the very exclusivity and parochial attitudes which are partially responsible for the problems that appear virtually inescapable today.

The advocates of slow growth movements cite numerous reasons for their involvement. They deny that they are extremists, either environmental, fiscal or social. Rather, they assert the desire to curb unplanned and undesirable development, to enhance the "quality of life" in the community, to reestablish fiscal stability for local governments, and in general to reduce the demands upon scarce resources in order to contribute to a healthier environment, socially, psychologically and physi-

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[16] R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970s (1973) [hereinafter cited as BABCOCK & BOSSELMAN].

[17] For arguments supporting controlled growth zoning see Fagin, *supra* note 1, at 300-303; Freilich, *supra* note 1, at 149-50; Note, *Time Controls on Land Use: Prophylactic Law for Planners*, 57 CORNELL L. REV. 827, 837-38 (1972) [hereinafter cited as Note, *Time Controls*]. Opposing arguments are presented in H. FRANKLIN, CONTROLLING URBAN GROWTH—BUT FOR WHOM? (Potomac Institute, 1972) [hereinafter cited as CONTROLLING URBAN GROWTH]; Alonso, *Urban Zero Population Growth*, 102 DAEDALUS 191 (Fall 1973); Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234 (1973).

[18] *See, e.g.*, BABCOCK & BOSSELMAN, *supra* note 16, at 31-38; E. BERGMAN, ELIMINATING EXCLUSIONARY ZONING: RECONCILING WORKPLACE AND RESIDENCE IN SUBURBAN AREAS (1974); Comment, *The Right to Travel and its Application to Restrictive Housing Laws*, 66 NW. U.L. REV. 635 (1971) [hereinafter cited as *Restrictive Housing Laws*]; Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?* 39 U. CHI. L. REV. 612 (1972) [hereinafter cited as *Another Constitutional Standard*].

cally.[19] Developers, on the other hand, mount equally impressive arguments, ranging from the cost-benefit analyses that reveal the opportunities for increased revenue, employment, and commercial investment, to appeals for citizen initiative in supporting and shaping the inevitable growth.[20] The effects of land development can be seen in five major areas: local economy, natural environment, aesthetic and cultural values, public and private services, and housing and social conditions.[21]

Urban growth reflects such factors as the regional economic situation, job market, industrial demography, and transportation facilities.[22] While the interaction of these factors is most often speculative, the courts assessing plans are often forced to rely on a market-based evaluation of the demand for housing and the relative availability of it.[23] Some courts have appealed for a regional perspective in land use planning to circumvent the parochial views adopted by the communities facing the bench.[24]

The proponents of local economic growth by attracting new industrial and commercial investments cite the positive influence of an expanded economy and labor base, and the eventual variety of professional work that will encourage a broadening and lengthening of the occupational ladder. The

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[19] For a discussion of the rationale offered to support slow growth schemes, see Fagin, *supra* note 1, at 303-04; Freilich, *supra* note 1, at 149-50.

[20] McKean, *Growth vs. No Growth: An Evaluation*, 102 DAEDALUS 207 (Fall 1973); Misuraca, *Petaluma vs. The T.J. Hooper: Must the Suburbs be Seaworthy?* in II MANAGEMENT & CONTROL OF GROWTH 187, 189-92 (R. Scott ed. 1975).

[21] P. SCHAENMAN & T. MULLER, MEASURING THE IMPACTS OF LAND DEVELOPMENT (1974).

[22] A. DOWNS, OPENING UP THE SUBURBS, ch. 3 (1973); Kain, *The Journey-to-Work as a Determinant of Residential Location*, in HOUSING URBAN AMERICA 211 (J. Pynoos, R. Schafer & C.W. Hartman eds. 1973).

[23] Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970); Christine Bldg. Co. v. City of Troy, 116 N.W.2d 816 (Mich. 1962); Oakwood at Madison, Inc. v. Township of Madison, 283 A.2d 353 (N.J. 1971); Golden v. Planning Bd. of Ramapo, 285 N.E. 2d 291, 334 N.Y.S.2d 138 (1972); Appeal of Kit-Mar Builders, 268 A.2d 765 (Pa. 1970); Appeal of Girsh, 263 A.2d 395 (Pa. 1970); National Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965).

[24] The most compelling plea was uttered by the New Jersey court in Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 732, 733 n.22 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975). *See also* Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1216 n.10 (8th Cir. 1972); Appeal of Girsh, 263 A.2d 395, 399 n.4 (Pa. 1970).

natural concomitant, of course, is an increased demand for housing. This can usually be met for those on the higher end of the pay scale through the construction of new single-family homes. It is the lower income groups who suffer, however, as "used" housing is not in plentiful supply in a tight housing market, and most developers have shied away from providing low-income multi-family residences.[25] Further, goals such as racial integration within a community are often suppressed in favor of the construction of low-income housing.

Those who benefit most from slowed growth programs are the present property owners and business proprietors who stand in line for the capital gains that come with rising property prices. If a site is desirable to others for future expansion, the likely effect of a no-growth or slow-growth policy is to raise both land and housing prices.[26] In addition, most programs serve to keep new residents out, favoring the current ones, even though the tax base may not be broadened. The exclusionary effects, whether intended or latent, are a major concern of all who consider any limitation on community growth. Whereas the problems of current land use systems transcend individual communities, the solutions have not. The inherent difficulties in any attempt to obtain endorsement by local jurisdictions for regional efforts arise due to traditional self-help orientations, program funding via local property taxes, and citizen demands that the local government be responsive to individualized interests. This local solution is unlikely to be modified though the problems of solely local solutions remain undiminished.[27]

In view of the critical importance of land use controls, the text to follow will examine the historical foundations and rationale behind controlled growth zoning schemes. Consideration will be given to the more novel plans which have been proposed. Because of their inevitable exclusionary effects, the probable outcome of legal challenges will be examined in light

[25] *See generally* Aloi, *Recent Developments in Exclusionary Zoning: The Second Generation Cases and the Environment,* 6 SW. U.L. REV. 88 (1974); Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls,* 22 SYRACUSE L. REV. 509 (1971); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 STAN. L. REV. 767 (1969).

[26] Thompson, *Problems That Sprout in the Shadow of No-Growth,* in I MANAGEMENT & CONTROL OF GROWTH 398, 403 (R. Scott ed. 1975).

[27] *See generally* BABCOCK & BOSSELMAN, *supra* note 16, at 135-46.

of the trends currently observable. Both those who promulgate and those who challenge restrictive ordinances are confronted by the insecurity once articulated by Justice Douglas: "As is true in most zoning cases, the precise impact on value may, at the threshold of litigation over validity, not yet be known."[28]

I. GENERAL LAND USE PLANNING

A. *Historical Backdrop*

The use of zoning devices to control permissible land uses has been observed in the United States for two centuries.[29] Prior to 1916, however, these attempts were both limited in scope and sporadic in application. Absent legislative enactments, competing land uses were controlled through the application of the common law of nuisance. Nuisance law was grounded on the premise that certain land uses are "incompatible with others and that the rights of all landowners will be diminished unless the rights of all are subject to reasonable restraints."[30] This doctrine has become the principle underlying comprehensive zoning schemes as well.

Several factors contributed to the decline of nuisance law as a viable land use control. First, the law was designed for individual conflicts, resolvable through the traditional case-by-case approach. Nuisance doctrine compelled the plaintiff to establish both that the use complained of was unreasonable and that it resulted in substantial harm to his property and thus reduced the property's value. Unless the plaintiff could prove actual physical injury to property, he was generally unable to sustain the burden of proving a decline in the value of his property.[31] Second, nuisance laws were designed to be restorative; they were of little help to landowners or municipalities which desired to anticipate the future and proscribe certain land uses. Restrictive covenants, the contractual limitation of certain land uses, and easements were more effective for private property owners.[32]

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[28] Village of Belle Terre v. Boraas, 416 U.S. 1, 10 (1974).

[29] D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 69 (1971).

[30] 1 R.ANDERSON, AMERICAN LAW OF ZONING § 2.03 (1968).

[31] *See generally* ANDERSON, *supra* note 30, at § 7.14.

[32] *See generally* HAGMAN, *supra* note 29, at §§ 165-69.

In part as a response to the inadequacies of individual controls, commentators advocated comprehensive zoning plans designed to introduce a preventive orientation to the regulation of competing land uses.[33] Once municipalities exercised their police power prerogatives, public management of private property was destined to become a way of life for urban America. The proper use of the police power allows local governments to legislate for the public health, safety and welfare[34] and to escape the reach of the taking provision of the fifth amendment.[35] Each landowner is forced to bear the cost of the land use limitations deemed socially desirable.[36]

Still, the power of individuals to develop land exceeded the land use controls until the promulgation of a plan that was in reality comprehensive.[37] New York City enacted the first, full-fledged zoning program in 1916 to address the problem confronting the city; the problem, as seen by the urban planners, was that "continued unplanned growth cannot take place with-

[33] ANDERSON, *supra* note 30, at §§ 2.03-.09 and HAGMAN, *supra* note 29, at §§ 28-52, both advocate comprehensive zoning.

[34] *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ordinance prohibiting an existing brick factory from operating in a developing residential area held valid); Reinman v. Little Rock, 237 U.S. 171 (1915) (ordinance excluding stables from a commercial district held valid); Welch v. Swasey, 214 U.S. 91 (1909) (state statute specifying building height limitations held valid); L'Hote v. New Orleans, 177 U.S. 587 (1900) (ordinance designating certain areas of city for prostitution held valid); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (ordinance prohibiting laundries from operating in wooden buildings held invalid); Barbier v. Connolly, 113 U.S. 27 (1885) and Soon Hing v. Crowley, 113 U.S. 703 (1885) (both upholding ordinances restricting the hours of laundries).

[35] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. A taking is held to have occurred when private property is subjected to land use regulations which are so arbitrary and unreasonable that the property is being used for public purposes without compensating the private owner. A full history of this issue is presented in F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS (1973).

[36] Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915).

[37] New York City's comprehensive zoning ordinance of 1916 was adopted partly in response to the growing concentration of skyscrapers in downtown Manhattan. By 1913 more than 50 buildings were above 20 stories and 9 were above 30. J. DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 20 (Joint Center for Urban Studies 1962). This zoning ordinance was upheld in Lincoln Trust Co. v. Williams Bldg. Corp., 128 N.E. 209 (1920).

out inviting social and economic disaster."[38] Yet in fact, as was soon demonstrated, zoning preserved the status quo.[39] Zoning plans conformed themselves to existing uses; while specifying uses for undeveloped areas in general, they failed to guide the urban growth process. Though this result may seem undesirable to those who wish to take an active hand in managing future growth, it accurately reflects the traditional emphasis placed on the preservation of property values.[40]

Since the police powers belong to the state, local governments could regulate land uses through zoning only if the state had either enacted enabling legislation or conveyed a specific grant of power.[41] By 1930, thirty-five states had enacted some form of enabling statute, often modeled after the Standard State Zoning Enabling Act of 1926, and today all states have such legislation.[42] As a general rule legislative pronouncements are presumed valid and constitutional.[43] Communities which have regulated land use pursuant to their state-granted powers have discovered that their zoning ordinances, unless arbitrary or unreasonable, are granted a presumption of validity by a judiciary reluctant to scrutinize legislative acts.[44]

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[38] NEW YORK COMMISSION ON BUILDING DISTRICTS AND RESTRICTIONS, PRELIMINARY REPORT, at 6 (1916), *quoted in* S. TOLL, *supra* note 11, at 184.

[39] S. TOLL, *supra* note 11, at 179.

[40] This emphasis on the preservation of property values was recently discussed in the committee report issued on the Land Use Policy and Planning Assistance Act of 1973:

> [F]or the most part the larger public interest was and is interpreted to be protection of property values and the economic value of land. The dependency of most cities on property taxes, which in turn are dependent on property values, serves to reinforce this prevailing purpose of land use controls.

SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, LAND USE POLICY AND PLANNING ASSISTANCE ACT, S. REP. No. 197, 93d Cong., 1st Sess. 75 (1973) (footnote omitted).

[41] In 1926 the U.S. Department of Commerce promulgated the model Standard State Zoning Enabling Act which granted the power to restrict population density to prevent overcrowding and to ensure the provision of adequate municipal services to the legislative branch of local governments. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STANDARD STATE ZONING ENABLING ACT (1926).

[42] *See* HAGMAN, *supra* note 29, at § 21.

[43] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[44] *Id.* The Court sanctioned several zoning devices still utilized, including spatial districting of a community, exclusion of industrial and commercial uses from residential areas, and even segregation of residential districts by density, *i.e.*, single-family versus multiple-family dwellings. Before the zoning ordinance will be declared unconstitutional, its provisions must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395.

The fundamental interest to be protected is the general welfare of the public. Inherent in this notion are questions concerning the level at which "public" is defined and what values are encompassed within "welfare." These issues continue to plague the courts. The definitions of general welfare and legitimate state objectives have broadened considerably since the Supreme Court's affirmance of comprehensive zoning in *Village of Euclid v. Amber Realty Co.*[45] The permissible regulation of potential land use through zoning has expanded to encompass the preservation of historical,[46] aesthetic,[47] and specific life style characteristics.[48] These precedents and the intense interest in zoning plans exhibited by suburban communities have paved the way for the logical extension of controlled growth zoning schemes.[49]

Furthermore, if the zoning classification is "debatable," then "the legislative judgment must be allowed to control." *Id.* at 388.

[45] *Id.* at 365.

[46] City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13 (N.M. 1964); *cf.* Hankins v. Borough of Rockleigh, 150 A.2d 63 (N.J. 1959) (rejecting historical preservation as a proper goal of zoning).

[47] Berman v. Parker, 348 U.S. 26 (1954). Justice Douglas penned the following oft-quoted statement:

> The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . .

Id. at 32-33.

[48] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Justice Douglas again delivered the majority opinion in which he stated, in what may become very persuasive dicta, that the general welfare was broad enough to encompass the following:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.

Id. at 9.

See also Moore v. City of E. Cleveland, 45 U.S.L.W. 3343 (1976), on which the Supreme Court is due to render judgment in the next few months. In *Moore* the plaintiff grandmother is appealing application of a zoning ordinance that denies family status to her, her son and grandson and would compel her son to live in a house other than his mother's. The petitioners in *Belle Terre* were unrelated students who did not fit the definition of family under the village's zoning ordinance. 416 U.S. 1 (1974).

[49] CONTROLLING URBAN GROWTH, *supra* note 17; Freilich, *supra* note 1, at 147-51; Note, *Time Controls, supra* note 17, at 845-49; *Another Constitutional Standard, supra* note 18, at 633-37.

B. *Controlled Growth Zoning*

Zoning has undergone radical change during the past decade. The next few pages will focus on the numerous attempts at systematically controlling the rate of urban growth. A scheme for controlled growth is one which is "intended comprehensively to phase the pace, guide the direction, and limit the volume of development throughout a locality."[50]

Proponents of controlled growth argue that such planning is necessary to overcome the drawbacks inherent in traditional Euclidian, or spatial, zoning schemes.[51] Regulations which do not concentrate exclusively on the spatial organization of communities, but which are designed to operate in a temporal dimension as well, can offer more effective and efficient guidelines to rational community development.[52] Cities and towns will thus be able to gauge their growth in reference to the availability of municipal services, such as water, waste disposal, schools and roads. Urban sprawl can be prevented, at least partially, by restrictions imposed primarily on residential construction.

Criticism of controlled growth planning centers on the exclusionary effects foreseen as inevitable. Just as previous zoning devices, ranging from minimum lot size[53] and floor area requirements[54] to cost ratios and multi-family restrictions,[55] have often resulted in the exclusion of certain racial or income groups,[56] the ability of a community to restrict the extent of

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[50] Franklin, *Legal Dimensions to Controlling Urban Growth*, in II MANAGEMENT & CONTROL OF GROWTH 216, 218 (R. Scott ed. 1975) [hereinafter cited as Franklin]. *See also* Fagin, *supra* note 1, at 298-99; Freilich, *supra* note 1, at 162.

[51] Fagin, *supra* note 1, at 298-99; Freilich, *supra* note 1, at 153-57.

[52] Fagin, *supra* note 1, at 298-99.

[53] *E.g.*, Fischer v. Township of Bedminster, 93 A.2d 378 (N.J. 1952); Bilbar Constr. Co. v. Board of Adjustment, 141 A.2d 851 (Pa. 1958).

[54] *E.g.*, Dundee Realty Co. v. Omaha, 13 N.W.2d 634 (Neb. 1944); Lionshead Lake, Inc. v. Township of Wayne, 89 A.2d 693 (N.J. 1952), *appeal dismissed*, 344 U.S. 919 (1953).

[55] *E.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955); Miller v. Board of Pub. Works, 234 P. 381, (Cal. 1925). *See also* Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040 (1963).

[56] Sager, *supra* note 25, at 767; Strong, *Girsh and Kit-Mar: An Unlikely Route to Equal Opportunity in Housing*, 22 ZONING DIGEST 100a (1970); Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971); *Symposium: Exclusionary Zoning*, 22 SYRACUSE L. REV. 465 (1971).

new construction is predicted to have a similar, if not more burdensome, effect.[57] Opponents of controlled growth schemes envision zoned enclaves attempting to foist the responsibilities of absorbing urban expansion on neighboring communities. They maintain that controlled growth plans serve, in reality, to protect the property interests of a limited segment of the population under the rubric of the general welfare.[58]

1. *The Building Moratorium*

A community caught in the throes of rapid expansion may decide to declare a moratorium on the approval of building permits, rezoning requests, or water and sewer connections. Such measures, if of limited duration, would probably survive legal challenge, given the precedent of interim zoning schemes which allow reassessment of the local comprehensive plan.[59] Furthermore, while such moratoria evidence the inadequacy of past municipal planning and zoning decisions, they will likely be held valid if imposed in good faith for a reasonable length of time. There is potential for abuse of this device by local communities, however; courts deciding these cases will be confronted with the dilemma of whether to revoke the presumption of validity in the face of a town's alleged improper motives.[60] In the final analysis, the projected duration of the measure should be controlling, though this may be difficult to establish.[61] The latent consequences of imposing moratoria include declining construction activity, economic ruin for small builders, less development of low-income housing, and increased growth for communities which have no similar controls.[62]

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[57] CONTROLLING URBAN GROWTH, *supra* note 17; Alonso, *supra* note 17; Bosselman, *supra* note 17, at 245-50; Sager, *supra* note 25, at 768-69.

[58] Davidoff & Davidoff, *supra* note 25, at 522; Williams & Norman, *supra* note 56, at 475-77.

[59] Franklin, *supra* note 50, at 218-19.

[60] Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972). The court upheld the town's rezoning of plaintiff's land for a minimum 6 acre lot per dwelling unit even though it had "serious worries whether the basic motivation of the town meeting was not simply to keep outsiders . . . out of the town . . . . Were we to adjudicate this as a restriction for all time . . . we might well come to a different conclusion." *Id.* at 962.

[61] Freilich, *supra* note 1, at 364.

[62] Rivkin, *Growth Control via Sewer Moratoria*, 32 URBAN LAND 10, 15 (March 1974).

2. *Building Caps*

One of the more direct attempts at controlling urban growth involves the imposition of a fixed quantity of building permits[63] or other limits upon the future construction of residential units.[64] Such policies serve effectively to curb future residential expansion. The Petaluma Plan provides an example of the rationale behind and the operation of a scheme utilizing building caps.[65]

During the 1960's the community character of Petaluma, California, changed from a quiet agricultural center of 14,000 to a commuter suburb of San Francisco. The 1970 population was 24,870, a seventy-seven percent increase over the 1960 figure.[66] In response to this rapid growth and because of the community's desire to preserve its quality of life, a local citizens' committee, guided by professional planning consultants, established an official development policy named the Petaluma Plan. Moratoria in rezoning and annexation of land were imposed until the community sentiment could be ascertained. After 9 months of study, an advisory measure was placed on the June 1973 ballot to elicit citizen reaction to a proposed limitation of 500 residential units per year. Eighty percent of the responding voters approved the plan. Coupled with the numerical restriction on new residential construction for 1973-1977 was the creation of an "urban extension line," a hypothetical boundary intended to mark the outer limits of the city's expansion for the next 15 years. Furthermore, the city contracted for municipal services on the basis of its limited development plan. Any proposed construction in excess of four units was to

[63] Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 422 U.S. 934 (1976).

[64] Arvida Corp. v. City of Boca Raton, 59 F.R.D. 316 (S.D. Fla. 1973). In 1971, residents of Boca Raton voted to place a maximum limit on dwelling units in the city at 40,000. Boca Raton, Fla., Ordinance 1733, § 1 (Oct. 3, 1972). The federal court declined to exercise jurisdiction in favor of the state courts' determination of the legality of the zoning ordinance.

[65] *See generally* Gruen, *The Economics of Petaluma: Unconstitutional Regional Socio-Economic Impacts*, in II MANAGEMENT & CONTROL OF GROWTH 173 (R. Scott ed. 1975); Misuraca, *Petaluma vs. The T.J. Hooper: Must the Suburbs be Seaworthy?*, in II MANAGEMENT & CONTROL OF GROWTH 187 (R. Scott ed. 1975).

[66] Einsweiler, Gleeson, Ball, Morris, & Sprague, *Comparative Descriptions of Selected Municipal Growth Guidance Systems*, in II MANAGEMENT & CONTROL OF GROWTH 283, 321 (R. Scott ed. 1975) [hereinafter cited as *Comparative Descriptions*].

be evaluated on a sliding point scale which took into consideration both proximity to public facilities and the quality of design and contribution to community welfare. The plan also required that between eight and twelve percent of the building permits issued be allocated to lower income housing.[67]

The Petaluma Plan was challenged in federal district court by local land owners and the Sonoma County Construction Industry Association.[68] Plaintiffs prevailed, according to Judge Burke, because the plan imposed an impermissible burden on the right to travel.[69] The Ninth Circuit Court of Appeals reversed the decision[70] on the basis of the lack of standing of the Association and appellee landowners to assert the claims of third parties.[71] Nevertheless, taking note of the district court's exclusive reliance on the issue of the right to travel, the court proceeded to address and dismiss appellees' claims that the plan was solely an exclusionary zoning regulation, was arbitrary and unreasonable, and hence violated the due process clause of the fourteenth amendment, and was an unreasonable restriction on interstate commerce.[72]

3. *Sequential Timing Controls*

Most traditional zoning devices control population density either directly or indirectly by regulating lot size, floor space requirements, the number of multi-family units, or using other spatial criteria.[73] By the addition of a time control concept, a community theoretically may coordinate both the pace and

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[67] Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 574-80 (N.D. Cal. 1974).

[68] *Id.* at 574.

[69] *Id.* at 583. *See also* text accompanying notes 129-51 *infra* for a discussion of the right to travel as a basis for challenging controlled growth plans.

[70] Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

[71] 522 F.2d at 905. *See also* text accompanying notes 83-121 *infra* for a consideration of the standing issue.

[72] 522 F.2d at 908-10.

[73] *See, e.g.*, Williams & Norman, *supra* note 56, at 481-84. The major zoning techniques that result in some form of exclusion are minimum building size requirements, restrictions on the number of bedrooms, prohibition of multiple-family dwelling units, frontage and lot-width specifications, lot size requirements and the exclusion of mobile homes.

sequence of its development.[74] Thus, designated areas are fully and efficiently developed before undeveloped, though perhaps proximate, land is released for community expansion. The town of Ramapo, New York, was a pioneer in the attempt to pattern temporally as well as spatially the residential growth.[75]

During the mid-1960's Ramapo residents sought a way to control the rapid suburban expansion caused by the influx of New York city workers. Population increased 120% between 1960 and 1970, school taxes rose rapidly and residential sprawl became noticeable.[76] In response the town amended its zoning ordinance to create a new residential development use permit. Approval of these special permits was conditioned on the presence of municipal facilities and services, for which Ramapo proposed an 18-year capital improvements funding plan. This plan scheduled sewage, drainage, road, recreation and park facilities in stages throughout the town. Residential development permits were granted if the site scored a certain number of points on a development scale established by the ordinance, covering the above services and the availability of school and fire facilities. Developers whose sites did not meet the minimum development points were allowed to install the necessary facilities at the landowners' expense in order to obtain the requisite building permits.[77]

The Ramapo plan has been tested in the courts.[78] Plaintiff landowners, builders' association and development corporation argued that the plan was beyond the scope of the state enabling legislation, that it resulted in a taking under the fifth amendment, and that it was exclusionary. The New York Court of Appeals upheld the town's program, approving the attempt to pace growth and development and hence maximize orderly population expansion.[79] In rejecting the taking argument, the

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[74] Note, *Time Controls on Land Use: Prophylactic Law for Planners,* 57 CORNELL L. REV. 827 (1972).

[75] *See generally* CONTROLLING URBAN GROWTH, *supra* note 17; Bosselman, *supra* note 17, at 238-42.

[76] *Comparative Descriptions, supra* note 66, at 304.

[77] *Id.* at 305.

[78] Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed,* 409 U.S. 1003 (1972).

[79] *Id.* The court declared:

> The answer which Ramapo has posed . . . is, however, a first practical step toward controlled growth achieved without forsaking broader social purposes

court observed that it was relying "upon the presently permissible inference that within a reasonable time the subject property will be put to the desired use at an appreciated value."[80]

II. ISSUES IN EXCLUSIONARY ZONING LITIGATION

It is apparent that the legal challenges to exclusionary zoning plans can take a number of approaches. Those who argue against exclusionary zoning point to its pernicious effects. One major allegation is that exclusionary zoning denies low-income and minority group Americans the same access to housing and social resources as that enjoyed by more affluent Americans.[81] The effects of restricting low-income or minority persons to urban centers can be seen in the inferior job opportunities, education, and social services available to inner city residents.[82] Whatever the zoning devices utilized, the legal attacks have been mounted primarily on constitutional grounds coupled where available with statutory challenges. Two issues are of concern here: defining the constitutional tests for standing to sue and identifying viable arguments against the zoning scheme or utilization.

. . . . [F]ar from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land.

Id. at 301, 302, 334 N.Y.S.2d at 150, 152.

[80] *Id.* at 304, 334 N.Y.S.2d at 155.

[81] Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1665 (1971); *cf.* B. SIEGAN, LAND USE WITHOUT ZONING 13-21 (1972) (all zoning is exclusionary and development without zoning ordinances is at least as viable a technique).

[82] For general consideration of the effects of segregation in the public schools, for example, see J. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (U.S. Dep't of Health, Education, and Welfare 1966); U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967); Epps, *The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality*, 39 LAW & CONTEMP. PROB. 300 (1975).

In addition there are disproportionately high numbers of black and minority Americans in the lowest income levels, *supra* note 10. Finally, the number of jobs available in the suburbs increased over the last decade from 7 to 10 million, while those in central cities declined from 12 to 11 million. In addition the number of commuters who leave center cities for work in suburban areas each day grew by 72.7% to reach 1.46 million in 1970. Lauber, *Recent Cases in Exclusionary Zoning*, in I MANAGEMENT & CONTROL OF GROWTH 465, 465-66 (R. Scott ed. 1975).

A. *Standing to Sue*

The first major threshold confronting parties who wish to challenge the validity of an exclusionary zoning scheme is whether the plaintiff has standing to sue.[83] In accord with the traditional mandate against rendering advisory opinions and the deeply ingrained custom of offering relief only to those actually injured,[84] courts have generally held that a plaintiff must have a personal stake in the dispute,[85] usually requiring that he or she own property affected by the zoning ordinance. The Supreme Court recently affirmed a restrictive view of standing in *Warth v. Seldin*.[86] In that case the Court held that the standing requirement was satisfied only by persons who owned land or who had actually planned to build within the community in question.[87]

Challenges to zoning ordinances are usually brought in state courts, for few plaintiffs are able to allege any substantive federal question.[88] Of late, some plaintiffs have sought recourse in federal courts where specific statutes waive the $10,000 jurisdictional amount.[89] Plaintiffs can, for example, bring suit against the city officials responsible for the zoning scheme, alleging violation of their civil rights and their fourteenth amendment rights.[90] Absent this route, unless the disputed ac-

[83] ANDERSON, *supra* note 30, at § 21.05. A good review is provided by Note, *Alternatives to "Warth v. Seldin": The Potential Resident Challenger of an Exclusionary Zoning Scheme*, 11 URB. L. ANN. 223 (1976).

[84] Reasons behind construing the Article III, § 2 grant of judicial power to "cases" or "controversies" are ably spelled out in BICKEL, THE LEAST DANGEROUS BRANCH (1962) and Frankfurter, *Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

[85] Baker v. Carr, 369 U.S. 186, 204 (1962).

[86] 422 U.S. 490 (1975) (Douglas, Brennan, White, and Marshall, JJ., dissenting).

[87] The Court asked that "a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention." *Id.* at 506.

[88] 28 U.S.C. § 1331(a)(1970) grants original jurisdiction to courts over civil actions in which the matter in controversy arises under federal law and exceeds $10,000. *See also* ANDERSON, *supra* note 30, at § 2.01.

[89] *E.g.*, 28 U.S.C. § 1343(3)(1970) allows a plaintiff in civil rights litigation to raise his complaint in district court whether or not he satisfies the $10,000 requirement.

[90] Courts assume jurisdiction over the city, represented by some official who satisfies the "person" language in 42 U.S.C. § 1983 (1970), under 28 U.S.C. § 1343 (1970). *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S.Ct. 555 (1977); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

tion was undertaken by a federal agency,[91] the plaintiff must maintain the action in state court.

The critical standing question concerns those plaintiffs who are *potential* residents or developers, that is, persons who have been effectively excluded from the community by the zoning regulations. In state court a plaintiff has standing to challenge the constitutionality of a zoning ordinance only if he or she is "personally aggrieved" by the operation of the regulation.[92] The same standard is generally used for petitioners who seek review before zoning boards of appeals[93] or petitioners who seek judicial review of administrative proceedings.[94] Most state courts interpret the standard in such a way as to compel the plaintiff to allege a specific personal stake that was adversely affected by the challenged ordinance.[95] This means that a plaintiff must either allege that he has a legal or equitable interest in the property or that a specific petition or application was adversely affected by the zoning regulation. For the most part, non-residents or developers without specific building plans lack standing under this formulation.[96]

Several state courts have expanded the standard for standing to include non-residents who own land in close proximity or adjacent to the area under dispute.[97] While a few states have

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[91] *E.g.*, a potential resident could challenge the development of a public housing project sponsored by a federal agency. *See* Evans v. Hills, IV EQUAL OPPORTUNITY IN HOUSING (P.H.) ¶ 13,669 (2d Cir. 1976), *rev'g* Evans v. Lynn, 376 F. Supp. 327 (1976), in which minority status plaintiffs challenged federal funding (by HUD) of a sewer project in a New York community with zoning laws that prevented development of low-income housing. The Second Circuit held that the potential residents did not satisfy the injury in fact portion of the standing test. *Id.* at ¶ 14,334.

[92] ANDERSON, *supra* note 30, at §§ 16.02, 16.03, 16.05, 16.11.

[93] The local board of appeals has, at the very least, original jurisdiction over applications for special permits, exceptions, or variances in the comprehensive zoning plan for the community. 2 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 4C-1 (1972).

[94] Often the next step for persons dissatisfied with the outcome of their petition before the board of appeals is review by a state court, which may not differentiate the standards necessary to challenge an administrative decision from those requisite for raising constitutional issues. ANDERSON, *supra* note 30, at §§ 16.11, 21.02. A different point of view is presented in Note, *Extending Standing to Nonresidents: A Response to the Exclusionary Effects of Zoning Fragmentation*, 24 VAND. L. REV. 341 (1971).

[95] For a discussion of standing in zoning cases, *see* Note, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 MICH. L. REV. 1070, 1072 (1966); Note, *supra* note 83, at 226.

[96] Note, *supra* note 83, at 226.

[97] *See* Foran v. Zoning Bd. of Appeals, 260 A.2d 609 (Conn. 1969); Pattison v.

adopted new legislation,[98] a "growing minority" of states are following the "trend toward liberalization" of the construction of "persons aggrieved."[99]

The standing question in federal court rests on similar considerations. The plaintiff must present a case or controversy[100] resolvable in an adversary proceeding.[101] The courts will decline to review cases involving political questions[102] or to render advisory opinions.[103] In 1970 the Supreme Court articulated a two-pronged test for standing in *Association of Data Processing Service Organizations, Inc. v. Camp.*[104] First, the plaintiff must allege that the disputed action caused him "injury in fact"; and second, the interest he seeks to protect must fall within the "zone of interests" regulated by the constitutional or statutory provision invoked.[105] Although the *Data Processing* case interpreted the standing question as it related to the Administrative Procedure Act,[106] the test has been applied in a number of exclusionary zoning cases.[107]

The first requirement of the federal test, "injury in fact," serves to satisfy the requirements of a case or controversy—a personal stake in the outcome for the plaintiff and the presen-

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Corby, 172 A.2d 490 (Md. 1961); Allen v. Coffell, 488 S.W.2d 671 (Mo. 1972); Borough of Cresskill v. Borough of Dumont, 104 A.2d 441 (N.J. 1954).

[98] The New Jersey legislature has taken a liberal view of standing:

> [A]ny person, whether residing within or *without* the municipality whose right to use, acquire, or enjoy property is or *may be* affected by an action under the act . . . may bring suit under the New Jersey zoning provisions.

N.J. STAT. ANN. § 40:55-47.1 (Supp. 1975) (emphasis added). *See also* Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URB. L. ANN. 9, 54-58, which describes the attempts by the Massachusetts and New York legislatures to take heed of the housing needs of potential residents within a region.

[99] Note, *supra* note 83, at 227.

[100] For the traditional construction of judicial power, see note 84 *supra*.

[101] Flast v. Cohen, 392 U.S. 83 (1968).

[102] Baker v. Carr, 369 U.S. 186, 208-37 (1962).

[103] Muskrat v. United States, 219 U.S. 346 (1911).

[104] 397 U.S. 150 (1970).

[105] Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 152-53 (1970).

[106] 5 U.S.C. § 702 (1970) (amended 1976).

[107] *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S.Ct. 555 (1977) (citing the Court's discussion of standing in *Warth v. Seldin*); Warth v. Seldin, 422 U.S. 490 (1975); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972).

tation of issues that are of "concrete adverseness."[108] This does not mean that the injury must be of a specific type;[109] in fact the Court has been willing to recognize and protect racial, economic, environmental, and aesthetic interests.[110] What is necessary, however, is that the plaintiff himself be specifically harmed and that the injury, regardless of its magnitude, be real and not hypothetical.[111] Thus, a plaintiff contesting an exclusionary zoning regulation must demonstrate some property interest in order to meet the injury in fact requirement.[112] This is consistent with the state courts' position discussed above.[113]

The second requirement of the standing test, that the plaintiff's interest fall within the "zone of interests" which are protected, generally calls for an analysis of the source of the claim asserted. The interests involved, whether economic, aesthetic, conservational or recreational,[114] must fall within the penumbras cast by constitutional or statutory rights.[115] The controlling question is: Does the plaintiff have a right to judicial relief, either from constitutional guarantees or statutory provisions?[116]

In deciding standing questions the Supreme Court has focused on the injury in fact portion of the test.[117] In *Warth* the Court held that a *non-resident* plaintiff meets this requirement for standing if he establishes a causal relationship between the

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[108] Baker v. Carr, 369 U.S. 186, 204 (1962). This standard embodies the constitutional limitations on jurisdiction in federal courts and directly addresses "justiciability," *i.e.*, whether the plaintiff has a controversy within the framework of Article III.

[109] Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256, 260 (1971).

[110] United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973). In this case an environmental group challenging an Interstate Commerce Commission freight rate increase on the basis of economic, recreational and aesthetic harm was granted standing by a Court which stated: "We have allowed important interests to be vindicated by plaintiffs with no more at stake . . . than a fraction of a vote . . . ." *Id.*

[111] O'Shea v. Littleton, 414 U.S. 488 (1974).

[112] Warth v. Seldin, 422 U.S. 490 (1975).

[113] *See* text accompanying notes 92-99 *supra*. *See also* Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 663 (1973).

[114] Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 152-56 (1970).

[115] Warth v. Seldin, 422 U.S. 490, 500 (1975).

[116] *Id.*

[117] *Id.* at 507-08.

zoning practices and the plaintiff's involvement with a particular project site.[118] That this is contrary to previous interpretations of the injury requirement by other courts has not deterred the Court at all.[119] The Court distinguished the other cases, declaring that plaintiffs had "challenged zoning restrictions as applied to particular projects that would supply housing within their means, and of which they were intended residents."[120] The Court has chosen to rely upon the presence of a specific project site as the initial threshold for determining injury in fact; unless potential residents and developers are involved with a particular site, they will be denied standing to sue. Despite the *Warth* facts, which limit its holding to non-residents who challenge exclusionary zoning in federal courts, state courts, if they are so inclined, may follow the initiative taken by the Supreme Court in limiting standing.[121]

B. *Traditional Challenges to the Validity of Zoning Ordinances*

Litigants seeking to test the validity of local zoning ordinances first look to the specific state enabling statute which delegates the authority to regulate land use to communities. Absent a showing that the ordinance in question exceeds the authority delegated, plaintiffs then turn to constitutional principles to attack the legislation. Several arguments are commonly utilized against local regulations. First, the ordinance may violate the constitutional requirement of due process if it is arbitrary or unreasonable or deprives a property owner of his land without "just compensation."[122] Thus the owner will allege

[118] *Id.* at 508 n.18. The need for an existing plan covering a building site satisfies the injury test, for without that, the Court will decline to review the case on the merits. Sierra Club v. Morton, 405 U.S. 727 (1972).

[119] Warth v. Seldin, 422 U.S. 490, 507 n.17 (1975).

[120] *Id.* at 507.

[121] Hyson, *The Problem of Relief in Developer-Initiated Exclusionary Zoning Litigation*, 12 URB. L. ANN. 21, 23 (1976).

[122] U.S. CONST. amend. XIV, § 1 provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The Supreme Court has interpreted this amendment to require just compensation for any "public taking" of private property. No compensation is required, however, if the public regulation of property is intended to secure the public health, safety, morals or welfare. *See generally* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings,*

that the regulation does not promote a reasonable public goal and that it arbitrarily denies him the reasonable use of his property.[123] A few courts have found regulations to be violative of due process when they fail to take into account regional needs as opposed to local interests.[124]

A second constitutional challenge is derived from the equal protection clause of the fourteenth amendment.[125] To invoke an equal protection argument, differential treatment of similar classes of people must be established. The courts utilize two tests to decide this issue: the traditional "rational basis" test under which the classification will be upheld if it is reasonably related to a legitimate state objective;[126] and the "compelling state interest" or "strict scrutiny" test which is invoked where suspect classifications or fundamental rights are involved.[127]

Private Property, and Public Rights, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power,* 74 YALE L.J. 36 (1964).

[123] This is a heavy burden for the plaintiff to carry, as courts generally favor the local regulation with the presumption of validity. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954) (ordinance sustained where power of eminent domain invoked for aesthetic reasons); Nectow v. City of Cambridge, 277 U.S. 183 (1928) (ordinance struck down); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (ordinance sustained despite trial court's finding of segregation by income).

[124] Appeal of Kit-Mar Builders, 268 A.2d 765 (Pa. 1950); Appeal of Girsh, 263 A.2d 395 (Pa. 1970); National Land and Inv. Co. v. Board of Adjustment, 215 A.2d 597 (Pa. 1965).

[125] U.S. CONST. amend. XIV, § 1 provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." *See generally* Note, *Exclusionary Zoning and Equal Protection,* 84 HARV. L. REV. 1645 ((1971).

[126] *See, e.g.*, King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971).

[127] To date, suspect classifications include race, creed and color. *See, e.g.,* Hunter v. Erickson, 393 U.S. 385, 392 (1969); *Restrictive Housing Laws, supra* note 18, at 647. Fundamental rights encompass marriage, Skinner v. Oklahoma, 316 U.S. 535 (1942); voting, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); criminal procedure safeguards, Griffin v. Illinois, 351 U.S. 12 (1956); and travel, Shapiro v. Thompson, 394 U.S. 618 (1969). While some have proposed that the right to housing should be classified a fundamental constitutional right, the Supreme Court in James v. Valtierra, 402 U.S. 137 (1971), rejected this suggestion in affirming a state requirement for a local referendum to approve any federally subsidized housing projects. Invoking the rational basis standard of review, the Court held the referendum advanced a legitimate state interest. 402 U.S. at 143. The court subsequently held there was no constitutional guarantee of a right to housing of "a particular quality", in fact, "[a]bsent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." Lindsey v. Normet, 405 U.S. 56, 74 (1972). *See* Comment, *The Evolution of Equal Protection—Education, Municipal Services, and Wealth,* 7 HARV. C.R.-C.L. REV. 103 (1973); *Another Constitutional Standard, supra* note 18, at 616-17.

Under the latter test the burden of proof shifts to the state and has historically proven extremely difficult to carry.[128]

C. *Freedom to Travel—A New Challenge to Exclusionary Zoning*

The constitutional right of freedom to travel has a rather obscure origin, arising not from express language in the Constitution, but rather from a series of cases involving interstate travel.[129] In three recent cases the Supreme Court has recognized that the fundamental right to travel includes the right to settle within a state. This inclusion springs initially from *Edwards v. California*,[130] in which the Court held that a statute which imposed a criminal sanction on any person bringing a non-resident indigent into the state placed an unconstitutional burden on interstate commerce[131] and the migration of non-residents.[132] In *Shapiro v. Thompson*,[133] the Court concluded that a 1 year residency requirement for eligibility for federally-sponsored welfare benefits was an unconstitutional limitation on the right to travel and settle within a state.[134] Further extending this right in *Memorial Hospital v. Maricopa County*,[135]

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[128] *Another Constitutional Standard, supra* note 18 at 616. Indeed, the Court has reaffirmed the difficulty of the state's burden of proof in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S.Ct. 555 (1977). However, citing Washington v. Davis, 426 U.S. 229 (1976), the Court declared that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 97 S.Ct. at 563.

[129] Beginning with Crandall v. Nevada, 73 U.S. (96 Wall.) 35 (1867), in which the Court declared invalid a state-imposed tax on all persons leaving the state by common carrier, the Court has moved from a narrow view of the right to travel to declaring the right to travel a fundamental right. The most recent cases involve durational residency requirements which have been held to penalize the exercise of the fundamental right to travel. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (one-year residency requirement for indigents to qualify for non-emergency medical care declared invalid); Dunn v. Blumstein, 405 U.S. 330 (1972) (requirement of residency of 1 year in state, 3 months in county for voter eligibility declared invalid); Shapiro v. Thompson, 394 U.S. 618 (1969) (1 year residency requirement for welfare benefit eligibility declared invalid). *See also Another Constitutional Standard, supra* note 18, at 622-24.

[130] 314 U.S. 160 (1941).

[131] *Id.* at 177.

[132] *Id.* at 178.

[133] 394 U.S. 618 (1969).

[134] *Id.* at 634, 638.

[135] 415 U.S. 250 (1974).

the Supreme Court struck down an Arizona statute which imposed a 1 year residency requirement on indigents for eligibility for state-funded medical services. Since the statute mandated residency in the county for 1 year and the Court relied on *Shapiro*, it appears that the right to migrate and settle applies intrastate as well as interstate.[136]

One effect of categorizing the right to travel as a fundamental constitutional right is illustrated in *Dunn v. Blumstein*.[137] A Tennessee statute imposing residency requirements of 1 year in the state and 3 months in the county before one could exercise the right to vote for both federal and state legislative candidates was held unconstitutional as a denial of the fundamental rights to travel and to vote.[138] The denial of the exercise of a fundamental right by state action compelled the Court to apply the "strict scrutiny" test[139] and required the state to establish a "compelling state interest" to justify the classification. On the other hand, if the court concludes that the classification does not deny a fundamental right but merely penalizes the exercise of a fundamental right, the court should weigh the penalty in terms of two factors: its potential impact in deterring the exercise of the right[140] and its impact on those who nevertheless exercised their rights in the face of the penalty.[141]

Although the two-phase impact determination test presented in *Memorial Hospital*[142] and founded upon *Shapiro*[143] is available to plaintiffs challenging exclusionary zoning regulations, it was not until the district court decision in *Petaluma*[144]

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[136] *Id.* at 264. *See also* Note, *Constitutional Law—Zoning—The Right to Travel Encompasses the Right to Live in any Municipality*, 23 KAN. L. REV. 324, 327 (1975).

[137] 405 U.S. 330 (1972).

[138] *Id.* at 336, 338.

[139] *See* text accompanying notes 125-27 *supra* for a discussion of the use of the equal protection clause of the fourteenth amendment.

[140] Thus in *Shapiro* the Court concluded: "An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence . . . ." 394 U.S. at 629.

[141] *Id.* at 627.

[142] 415 U.S. 250, 256-58 (1974).

[143] 394 U.S. 618 (1969) (right to travel in the context of equal protection).

[144] 375 F. Supp. 574 (N.D. Cal. 1974). *See* text accompanying notes 65-72 *supra* for further discussion of the Petaluma Plan.

that a zoning case turned on the fundamental right to travel.[145] An implicit theme relied on in *Petaluma* is the right of individuals to migrate without being confronted by community after community with exclusionary zoning controls.[146] The issue of timed development presented to the Court of Appeals in New York in the *Ramapo* case was not cited by the district court in *Petaluma*.[147] While the New York court was openly critical of exclusionary zoning, deeming it unconstitutional, the court held the sequential growth plan adopted by the town of Ramapo reflected permissible state objectives despite its restrictive character.[148]

The viability of the right to travel as a significant challenge to attempts at exclusionary zoning was re-defined by the California district court. Rather than applying the two-factor, impact-determination test to evaluate the reasonableness of a restriction on the right to travel as articulated by the Supreme Court,[149] the court took the position that any restraint on the fundamental right to travel must be justified by showing a compelling state interest.[150] So, the challenge might be raised successfully where the local regulations create a level of deterrence sufficiently burdensome to impair the freedom to travel

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[145] The argument had been made by the plaintiff in Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974) that his right to travel and settle was violated by a zoning ordinance which restricted land use to single-family dwellings and defined family as persons related by blood or marriage or no more than two persons living together who are not so related. The Court held the ordinance violated no fundamental rights, nor was it aimed solely at transients.

[146] 375 F. Supp. 574, 588 (N.D. Cal. 1974).

[147] The concept of timed development is discussed in the text accompanying notes 75-80 *supra*.

[148] Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). The court found the Ramapo plan sought "not to freeze population at present levels but to maximize growth by the efficient use of land, and in so doing testify to this community's continuing rule in population assimilation." 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

Interestingly, the court's warm acceptance of Ramapo's goals was apparently undisturbed by such realities as (a) two-thirds of the vacant land set aside for residential development is limited to large-lot zoning, (b) no multi-family dwellings are allowed in the town of Ramapo and, (c) with the possible exception of privately sponsored housing for the elderly, no public or FHA subsidized housing is scheduled beyond the 49 units of low-income housing that were in existence before implementation of the plan. CONTROLLING URBAN GROWTH, *supra* note 17.

[149] Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

[150] 375 F. Supp. at 581-82.

among all non-residents, as where neighboring communities all enact their own restrictive growth schemes.[151]

D. *The New General Welfare Standard*

Although zoning has traditionally taken a parochial view of community interests, this need not be so in the future. The Supreme Court in *Village of Euclid v. Ambler Realty Co.* recognized that a municipality might not be allowed to stand in the way of the general public interest.[152] To date the most notable expansion of the definition of general welfare has come from the Pennsylvania and New Jersey Supreme Courts. In several important cases these courts have considered the needs of the region rather than simply the desires of the communities in question.

In 1965 the Pennsylvania Supreme Court declared that communities must not be allowed to shirk the responsibilities created by the pressures of suburban migration, in this case through the vehicle of large-lot zoning.[153] Specifically the court stated that "[a] zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid."[154] Relying upon this case, the same court 5 years later held that a community could not adopt a large-lot zoning ordinance if its effect was to impose a disproportionate share of future population growth on surrounding towns.[155] Again the court, in cogent dicta, stated that "[i]t is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area."[156]

Perhaps the most sweeping decision to date which affirms the notion that the general welfare cannot be defined by focusing on individual communities is *Southern Burlington County NAACP v. Township of Mount Laurel.*[157] Not only did the New

[151] Zumbrun & Hookano, *No-Growth and Related Land-Use Legal Problems*, 9 URBAN LAW 122 (1977); Note, *supra* note 83.

[152] 272 U.S. 365, 390 (1926).

[153] National Land and Inv. Co. v. Kohn, 215 A.2d 597, 610 (Pa. 1965).

[154] *Id.* at 612.

[155] Appeal of Kit-Mar Builders, 268 A.2d 765 (Pa. 1970).

[156] *Id.* at 768.

[157] 336 A.2d 713 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975).

Jersey court mandate a regional view for classifying general welfare, but it also revealed a willingness to institute an affirmative action program to restructure the land use policy of a *region*. General welfare was defined as extending beyond the boundaries of individual communities and hence should not "be parochially confined to the claimed good of the particular municipality."[158] Since every community must accept its fair share of the region's housing needs,[159] the court concluded that the appropriate remedy for those plaintiffs who had been excluded by the zoning ordinance (including *potential* residents) was a reform of Mount Laurel's land use regulations with an eye to the entire region.[160]

III. PROSPECTS FOR POTENTIAL CHALLENGERS

Few courts may be willing to take the activist stance adopted by the New Jersey court in *Mount Laurel*. The determination of the fair share of a region's housing needs is enough to keep planning experts busy indefinitely; how often are courts willing to oversee and evaluate such extended research?[161] And yet the challenge has been proffered: Growth management cannot be encouraged if it maintains a parochial view which makes no attempt to correlate resources and population, as well as economic and environmental goals.[162]

Those who would contest controlled growth techniques as exclusionary should find more success in statutory or constitutional arguments. Assuming one is able to hurdle the question of standing,[163] petitioners may argue violation of their civil rights by the zoning ordinances.[164] The two Supreme Court

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[158] *Id.* at 727.

[159] *Id.* at 732-34. The court stated: "More specifically, presumptively it [the community] cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor." *Id.* at 734.

[160] *Id.* at 734. For a discussion of various ways to determine a community's fair share of housing needs, *see* Rose, *Fair Share Housing Allocation Plans: Which Formula Will Pacify the Contentious Suburbs?* 12 URB. L. ANN. 3 (1976).

[161] Rose, *supra* note 160, at 19.

[162] *See* Zumbrun & Hookano, *supra* note 151, at 147-49 for a discussion of the the necessity for a broader perspective on managed growth schemes.

[163] For a consideration of standing, *see* text accompanying notes 83-120 *supra*.

[164] *See, e.g.*, Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d through 2000d-

cases, *Euclid* and *Arlington Heights*, have not been encouraging, though the Court has said it is primarily an issue of proof. Indeed, in *Arlington Heights*,[165] proof of a racially discriminatory purpose would "have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."[166] The Court appears willing to apply a sliding scale for the sufficiency of proof for both motive behind and impact of the challenged ordinance so that local municipal decisions will rarely be overturned.[167]

Despite the novelty of the constitutional argument of an exclusionary ordinance violating the fundamental right to travel, no federal court of appeals has yet been willing to overturn a zoning scheme on this basis.[168] It would seem that those who wish to reform the localized orientations which reign today would do better by focusing their efforts on legislative changes rather than relying on the slim chance that they will be the beneficiaries of judicial activism. In view of the Supreme Court's strict interpretation of the prudential rules of standing, potential residents of a community which practices some type of controlled growth are effectively excluded from litigating such programs on the merits. As desirable and attractive as rational planning may be, a balance must be struck, for increasingly, the actions of a few affect many as the interdependence of individuals, groups and regions becomes inescapable.

C. Davis Hendricks

4 (1970); Civil Rights Act of 1968 (Title VIII), 42 U.S.C. §§ 3601-31 (1970).

[165] Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S.Ct. 555 (1977).

[166] *Id.* at 566 n.21.

[167] Both the Petaluma and Ramapo schemes, discussed in text accompany notes 65-80 *supra* have withstood court challenges.

[168] *See* text accompanying notes 129-51 *supra* for a discussion of the freedom to travel.